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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 324

HARRY C. DAVIS, C. J. ROOT, AND ROY HOLLIS,
PETITIONERS

v.

CITY OF HOMESTEAD, FLORIDA, AND THE UNITED STATES OF AMERICA (INTERVENOR)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Judge was entered without opinion (R. 117–118). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 130–132) is reported in 112 F. (2d) 438.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1940 (R. 132). A petition for rehearing (R. 133–151) was denied July 8, 1940 (R. 152). The petition for a writ of cer-

tiorari was filed August 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347.

QUESTIONS PRESENTED

Over two-thirds of the creditors of a city, subsequent to the passage of the present Municipal Bankruptcy Act but prior to the decision of this Court sustaining its validity, voluntarily accepted refunding bonds in exchange for old bonds, pursuant to a plan submitted by the city. After the decision sustaining the Act, the plan was submitted by the city for confirmation in composition proceedings under Section 83 (j).

The questions are:

1. Whether, for the purpose of determining whether sufficient creditors had consented to the filing of the petition and to the confirmation of the plan, holders of the refunding bonds may be included among the consenting creditors.

2. Whether Section 83 (j), if construed so as to authorize their inclusion, is violative of the Fifth or Tenth Amendments.

STATUTE INVOLVED

Section 83 (j) of the Bankruptcy Act as amended, June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940 (11 U. S. C., Supp V, Sec. 403 (j)), provides:

> The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this Act by the exchange of new evidences of indebtedness

under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this Act, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition.

INTEREST OF THE UNITED STATES

The United States was granted leave to intervene, pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. Sec. 401), to uphold the constitutionality of the Act of June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940, Section 83 (j) of the Bankruptcy Act (11 U. S. C., Supp. V, Sec. 403 (j)). This brief is accordingly limited to a discussion of the constitutional questions involved.

STATEMENT

On May 3, 1939, the City of Homestead, Florida, filed a petition for composition of its debts (R. 1–19) pursuant to Sections 81–84 of the Bankruptcy Act, 11 U. S. C., Supp. V, Secs. 401–401. The petition alleged that the city was then insolvent (R. 16); that on or about October 18, 1937, the city proposed to its creditors a plan of composition under which refunding bonds and coupon certificates would be ex-

changed for the then-outstanding bonds, conditioned on acceptance by holders of 75% of the outstanding bonds (R. 2–3); that the required number of consents had been obtained; and that the refunding bonds and coupon certificates had been exchanged for more than 75% of the old bonds of the consenting creditors (R. 2–4). The petition alleged further that the holders of more than 51% of the securities affected by the plan had consented (R. 13, 16, 18) to the filing of the petition and prayed the confirmation and completion of the plan (R. 18–19). The district court approved the filing of the petition on May 3, 1939 (R. 74) and ordered a hearing to be had on July 25, 1939 (R. 74–79). Petitioners filed answers and objections to the plan (R. 80–85, 89–101, 105–115), and two of the petitioners moved to dismiss the petition (R. 86–89, 102–105).

The answers and motions to dismiss alleged, *inter alia,* that Section 83 (j) of the Bankruptcy Act, if construed to authorize the inclusion of the consents of holders of the new refunding bonds and certificates in the 51% of the consenting creditors required by the Municipal Bankruptcy Act for the filing of the petition, and in the 66⅔% required for confirmation of the plan, violated the Fifth and Tenth Amendments of the Constitution of the United States (R. 87, 96, 103–104, 111–112).

The United States was permitted to intervene (R. 115–116) pursuant to the Act of August 24,

1937, Public, No. 352, 75th Congress, and immediately filed a petition praying that the objections to the constitutionality of the statute be overruled (R. 115–116). On October 21, 1939, the district court denied the motions to dismiss, overruled "certain matters of law" in the answers (R. 117–118), and referred the case to a Special Master for the taking of testimony (R. 118). From the order denying the motion to dismiss and overruling the matters of law in the answers, the petitioners appealed (R. 119).

On appeal the court below, following its decision in *American National Bank* v. *City of Sanford,* 112 F. (2d) 435 (No. 323, present Term, on petition for writ of certiorari), affirmed the order (R. 130–132).

ARGUMENT

1. The petitioners' contention that Section 83 (j), if construed to apply to this case, violates the Tenth Amendment is without substance. The "subject of bankruptcies" is nothing less than "the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." *In re Reiman,* Fed. Cas. No. 11,673, at 496–497, quoted with express approval in *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 672–673; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 588; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187; *United States* v. *Bekins,* 304 U. S. 27, 47; and *Wright* v. *Union Central Ins. Co.,* 304 U. S.

502, 513–514. The innovation, if any, involved in the extension of the composition provisions of the municipal bankruptcy legislation to cases in which refunding operations have been partially executed by voluntary exchange is slight indeed when compared to those which have been uniformly sustained by this Court. See *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 671.

2. The question whether Section 83 (j), as applied to this composition proceeding, violates the Fifth Amendment is substantially the same as that presented in No. 323; the Court is therefore respectfuly referred to the discussion of this point in the Government's brief in opposition in that case.

The facts of this case differ from those in No. 323 in only one respect. Here the city's offer to refund outstanding bonds was made shortly after the passage of the present Municipal Bankruptcy Act, although prior to this Court's decision in *United States* v. *Bekins,* 304 U. S. 27, sustaining its constitutional validity. The dissenting creditors were thus put on notice, by a statute then in effect, that by following the statutory procedure the city and the consenting creditors could bind the small minority of dissenters. This has now been accomplished. Petitioner can obtain no advantage from the fact that the city first chose to seek a voluntary settlement rather than a com-

position under a statute which could then be viewed only as of dubious validity; here, as in No. 323, Congress could make the consents valid retroactively. Compare *Welch* v. *Henry,* 305 U. S. 134, 147–148.

3. The decision of the Circuit Court of Appeals for the Eighth Circuit in *Luehrmann* v. *Drainage Dist. No. 7,* 104 F. (2d) 696, is not in conflict with the decision below. In that case the Reconstruction Finance Corporation made a refunding loan to the drainage district; more than 98% of the bonds were deposited with a trustee. The bonds were not cancelled but were held as security for the payment of the debt. After the passage of the Municipal Bankruptcy Act of 1934, disbursements to the depositing bondholders were made on the basis of approximately 25% of the face value of the securities. The 1934 act was subsequently invalidated, but, following the passage of the present statute, composition proceedings were instituted. The court held that the bondholders who deposited their securities and settled on the basis of 25% of the par value were entitled to be included among the consenting creditors. It is true that the court mentioned the fact that the bonds were not cancelled and were retained as security for the payment of the debt. But it nowhere suggested, and certainly did not hold, that a different result would have been reached if the bonds had been cancelled. Section 83 (j) was nowhere adverted to in the opinion.

CONCLUSION

The decision of the court below was correct. There is no conflict. The petition for certiorari should, therefore, be denied.

Respectfully submitted.

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